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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE E. GARDNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The tax deficiency notice requirements of Internal Revenue Code (IRC) §6212 and §6213(a) *prohibit* the IRS from:

- ✦assessing a tax deficiency,
- ✦levying any property, and
- ✦taking any court action to collect a tax deficiency,

until notice of the tax deficiency has been mailed to the "taxpayer's last known address".

Taxpayer/Bruce E. Gardner's, 1990 tax return was audited by the IRS in Houston, Texas when he was employed as a Senior Trial Attorney with the IRS' Sacramento District Counsel's Office. Mr.Gardner's Sacramento supervisors told him he had "no rights concerning his 1990 tax audit".

On August 22, 1995, the IRS made an income tax assessment against the taxpayer for the 1990 tax year ***prior to*** mailing him a notice of the tax deficiency. Two years later, the IRS commenced to levy the taxpayer's bank account ***prior to*** mailing a deficiency notice.

Since a notice of the tax deficiency was never mailed by the IRS to the taxpayer, Mr. Gardner filed a motion with the district court to enjoin the IRS levy because the IRS failed to comply with the mandatory tax deficiency notice pre-requisites and therefore, no legal tax debt was ever created. In *Gardner I*,[1] the district court held it lacked subject matter jurisdiction over the IRS' violation of 26 U.S.C § 6212 and §6213(a) which is in direct conflict with this Court's decision

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[1] *Gardner, et al v. United States*, 96 CV 523 (D.C. D.C.1999) **A22.**

in *Commissioner v Shaprio*,474 U. S. 614, 616 (1976) and *Laing v United States*, 423 U.S. 161 (1970). Then the district court dismissed the 1990 tax refund action because the taxpayer had not paid a 1995 tax assessment, even though the refund claim was based only on overpayment of the fully paid 1991 tax assessment. This dismissal is in direct conflict with this Court's decision in *Flora v. United States*, 363 U.S. 145, 175 (1960)..

The same issues raised by motion in *Gardner I*, were raised in a separate complaint in *Gardner III*.[2] On brief , the IRS conceded the district court had jurisdiction over violations of the statutory tax deficiency notice requirements. However, the D.C. Circuit declined to hold that the IRS lacked authority to make the 1995 tax assessment and, therefore, no legal tax debt was ever created. *Id.*

Whether the IRS' violation of the mandatory notice deficiency requirements of IRC§ 6213 precluded the IRS under §6213(a) from making the 1995 tax assessment, therefore no tax debt arose in 1995 and the district court had jurisdiction to determine whether Mr. Gardner overpaid the 1991 tax assessment from which he claimed a refund. Thus, the dismissal of the 1990 refund action in *Gardner I* and the portion of *Gardner III* that addressed that issue should be reversed.

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[2]*Gardner v. United States*, 97 CV 3075 (D.C.D.C 1999) **A18.**

2. Whether taxpayer/Gardner's rights of equal protection of the law were violated when the IRS' failed to afford him the protections afforded other taxpayers under 26 U.S.C.§6212 and §6213(a) because he was an IRS employee.

3. Taxpayer/Gardner filed a supplemental 1990 income tax refund claim in the amount of $1,939.00 for overpayment of an April 15, 1991 IRS income tax assessment. The 1991 income tax assessment was **fully paid** by the taxpayer.**A32.** However, Mr. Gardner's supplemental refund claim was never processed by the IRS because it conflicted with the graveman of his employer's adverse personnel action against him. Mr. Gardner's supervisor's wanted to discharged him from his Senior IRS Trial Attorney position based on allegations that he purportedly owed $1,680.00 in supplemental income taxes for the 1990 tax year based on an IRS tax audit of his original Form 1040.

In response to the taxpayer's refund claim that he overpaid the 1991 tax assessment by $1,939.00, the IRS by the motion, alleged a 1995 tax deficiency in the amount of $1,680 assessed on August 22, 1995 warranted dismissal of Mr. Gardner's tax refund action for lack of subject matter jurisdiction because the taxpayer had not fully paid the 1995 tax assessment.

The district court held that it lacked jurisdiction under Fed.R.Civ.P 12(b)(1) to determine whether Mr. Gardner over paid the 1991 income tax assessment because all the tax assessments for the entire 1990 tax year had not been paid

2. Whether taxpayer/Gardner's rights of equal protection of the law were violated when the IRS' failed to afford him the protections afforded other taxpayers under 26 U.S.C.§6212 and §6213(a) because he was an IRS employee.

3. Taxpayer/Gardner filed a supplemental 1990 income tax refund claim in the amount of $1,939.00 for overpayment of an April 15, 1991 IRS income tax assessment. The 1991 income tax assessment was **fully paid** by the taxpayer.**A[3]32.** However, Mr. Gardner's supplemental refund claim was never processed by the IRS because it conflicted with the graveman of his employer's adverse personnel action against him. Mr. Gardner's supervisor's wanted to discharged him from his Senior IRS Trial Attorney position based on allegations that he purportedly owed $1,680.00 in supplemental income taxes for the 1990 tax year based on an IRS tax audit of his original Form 1040.

In response to the taxpayer's refund claim that he overpaid the 1991 tax assessment by $1,939.00, the IRS by the motion, alleged a 1995 tax deficiency in the amount of $1,680 assessed on August 22, 1995 warranted dismissal of Mr. Gardner's tax refund action for lack of subject matter jurisdiction because the taxpayer had not fully paid the 1995 tax assessment.

The district court held that it lacked jurisdiction under Fed.R.Civ.P 12(b)(1) to determine whether Mr. Gardner over paid the 1991 income tax assessment because all the tax assessments for the entire 1990 tax year had not been paid

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[3]A=Appendix

even though it admits the 1991 tax assessment upon which the refund claim was made was fully paid **A 17,32.**

Whether 28 U.S.C.§ 1346(a)(1) limits a district court's subject matter jurisdiction over a refund action to "the income tax assessment" upon which the refund claim is made when paid in full prior to filing the refund suit. Therefore, the district court has subject matter jurisdiction under 28 U.S.C § 1346(a)(1) to decided the taxpayer's 1990 tax refund claim based on overpayment of the fully paid 1991 tax assessment upon which the claim was based. Hence the district court's Fed.R.Civ.P. 12(b)(1) dismissal should be reversed. *Flora* .

4. Whether the district court lacked subject matter jurisdiction over the alleged 1995 tax deficiency because Congress reserved jurisdiction over tax deficiency issues to the U.S. Tax Court, the IRS never counterclaimed the alleged tax debt into the 1990 tax refund action, and the tax deficiency did not satisfy any of the requirements of a tax refund action. *Flora* 184.

5. In *Gardner III*, the D.C. Circuit held the district court abused its discretion when it dismissed Mr. Gardner's case for failure to prosecute because of his medical absence from the first motion hearing. The D.C. Circuit did not address the Rule 41(b) dismissal in *Gardner I* when it denied Mr. Gardner's motion for summary reversal and then *sua sponte* summarily affirmed the district court's Rule 12(b)(1) jurisdictional dismissal of the IRS' violations of 26 U.S.C.§ 6212 and §6213(a). **A16**

The district court's Rule 41(b) dismissal of *Gardner I, II*[4], *and III*, arose out of the same facts because the district court set a joint motions hearing for all three cases on January 27, 1999, before dismissing them pursuant to Rule 41(b) for a documented medical absence. The D.C. Circuit reversed the Rule 41(b) dismissals in *Gardner II* and *III* for abuse of discretion but it never addressed that issue in *Gardner I*.

Whether the district court abused its discretion in *Gardner I* when it dismissed the tax refund actions with prejudice for want of prosecution under Fed.R.Civ.P. 41(b) when plaintiff's documented medical condition resulted in his absence from the first motion hearing and no history of contemptuous conduct existed.

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[4] *Gardner v. U.S. et al*, 99-5089 (D.C. Cir.1999)

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Gardner et al. v. United States of America.
96 CV 0523 (D.C.D.C. 1999)

JURISDICTION

The jurisdiction of this Court over appellate decisions in civil tax case is conferred by 28 USC§1254(1).

The district court had jurisdiction over this 1990 tax refund action pursuant to 28 U.S.C.§1346(a)(1) because "the [1991] tax assessment" upon which the refund claim was made was fully paid.**A32;** *Flora, 150-51.* However, the district court lacked subject matter jurisdiction over the alleged 1990 tax deficiency resulting from non-payment of the 1995 assessment of that deficiency. *Id.;* 26 U.S.C.§6213(a).

On May 19, 2000, the Court of Appeals for the District of Columbia reversed the district court's Rule 12(b)(1) and 41(b) dismissals of the taxpayer's compliant. The taxpayer asserted violations of his 5th Amendment and statutory rights to notice and an opportunity to be heard. **A19-20.** §6213(a).**A1.** Despite the D.C. Circuit's decision in *Gardner III* that the district court had jurisdiction under IRC § 6213(a) to decide issues resulting from violations of the mandatory tax deficiency notice laws, it declined to reverse its panel's *sua sponte* summary affirmance of that same issue raised in the *Gardner I* appeal.[5] **A9, A15.**

On July 21, 2000, the D.C. Circuit expressly reconsidered the effect of the IRS' violation of the prohibition against tax assessments and levies under IRC§ 6213(a) in *Gardner I* when deciding *Gardner III* . However, the appellate court declined to realign the issue of the district court's subject matter jurisdiction over IRS violations of IRC §6213(a), decided in *Gardner III*, with its decision in *Gardner I* to dismiss the 1990 tax refund suit because of a prohibited 1995 tax assessment.§6213(a). The D.C. Circuit simultaneously denied the petition for rehearing and suggestion for en banc review on July 21, 2000 **A54.**

On October 19, 2000, Mr. Gardner timely lodged his petition with this Court within 90 days from the date the D.C. Circuit denied his petition for rehearing. This Court allowed Mr. Gardner an additional 60 days to perfect the lodged petition. This corrected petition is lodged within the additional 60 days granted by this Court

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[5] *Gardner et al. v. United States of America.* No.99-5080 , *reh'g denied*, (D.C.Cir. 1999)

STATUTORY PROVISION INVOLVED

U.S. CONSTITUTION, Amendment V

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed.R.Civ.P.12 - Defenses and Objections...

(b) Every defense, in law or fact, to a claim for relief in any pleading, ..., shall be asserted in the responsive pleading...,except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter...

26 U.S.C.§ 6212 - Notice of Deficiency

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B . He is *authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.* [emphasis added.].

26 U.S.C. §6213(a)- Restrictions Applicable to Deficiencies: Petition to Tax Court.

...[A]fter the notice of deficiency authorized in section 6212 is mailed,...,**the taxpayer may file a petition with the Tax Court for *a redetermination of the deficiency***. Except as otherwise provided...**no assessment of a deficiency** in respect of any tax imposed by subtitle A or B, ,,, and **no levy or proceeding in court for its collection** shall be made, begun, or prosecuted ***until such notice has been mailed to the taxpayer.*** [emphasis added]. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such *prohibition is in force* **may be enjoined in a**

proceeding in the proper court, including the Tax Court. [emphasis added.]

26 U.S. C. 6511- Limitations on Credit or Refund

Claim for credit or refund of an overpayment of any tax imposed by title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later...

28 USC § 1331 - Federal Question

The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 USC § 1361 - Action to compel an officer of the United States to perform his duty.

The district court shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C.§ 1340 - Internal revenue; customs duties.

The district court shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue,...

28 U.S. C.§ 1346 - United States as defendant.

(a) *The district court shall have original jurisdiction,* concurrent with the United States Court of Federal Claims, of

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been

erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws:

26 U.S.C.§6512 -Limitation In Case of Petition To Tax Court.

If the Secretary has mailed to the taxpayer a notice of deficiency and section 6212(a)(relating to deficiencies of income...) And if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a)... no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court except

(1)As to over payments determined by a decision of the Tax Court which has become final;

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax which has become final...

STATEMENT OF THE CASE

This case involves the limited jurisdiction of the U.S. District Court under 28 U.S.C.§ 1346(a) to determine whether a taxpayer over paid a 1991 income tax assessment and is entitled to a refund. The taxpayer timely filed his refund claim asserting that "***the***" 1991 tax assessment was overpaid by $1,939.00. *Flora.* The IRS refused to act on said claim because the taxpayer was an IRS employee and his supervisors wanted to terminate his employment based on an alleged 1990 tax deficiency of $1,680.

This Court in *Flora* held the district court has jurisdiction over a tax refund actions so long as ***"the*** tax assessment" for which the refund is claimed was fully paid

prior to filing the action. *Id* 177. 28 U.S.C.§ 1346(a) Although the district court recognized that it has subject matter when "***the*** challenged [1991] tax assessment was paid" it erroneously dismissed the taxpayer's 1990 tax refund action pursuant to Rule 12(b) (1) because the taxpayer had not paid the 1995 tax assessment which was never a basis of the refund claim.**A25,32.** In essence, the district court denied Mr. Gardner access to the court for not paying a $1,680 tax deficiency that was not properly before the court. Only the U.S. Tax Court has jurisdiction to determine a tax deficiency for the entire tax year[6] and Mr. Gardner was denied access to the Tax Court because the IRS boldly and intentionally violated the mandatory tax deficiency notice statutes.[7]

The district court and D.C. Circuit incorrectly expanded the *Flora* decision to require payment of all tax assessments for the same tax year before jurisdiction is conferred on the district court. **A17;** *Flora 175.* This expanded view of *Flora* defeats the statutory refund scheme Congress set forth when it enacted IRC§6511 and is in direct conflict with this Court's decisions in *Shapiro*[8] and *Laing*[9] which held mailing a notice of the tax deficiency to the taxpayer is a pre-requisite to a tax assessment and levy. And

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[6] *Pfeiffer Company v. United States,518 F.2d 124, 130 (8th Cir. 1975).*

[7] Judge Sullivan also denied Gardner access to the court by his Rule 12(b) and Rule 41(b) dismissal of *Gardner I, II, & III.*

[8] *Commissioner v. Shapiro, 424, U.S. 614, 616 (1976).* **[certiorari from the District of Columbia Circuit.]**

[9] *Laing v. United States, 423 U.S. 161, 184 n.27 (1976).*

the taxpayer is **not** required to pay a tax assessment when the IRS has not complied with the mandatory tax deficiency notice statutes. *Laing 184; Shapiro 616*;§6213(a).

The issue of the district court's subject matter jurisdiction over Mr. Gardner's claim that he overpaid the 1991 income tax assessment by $1,939.00 was first raised in *Gardner I* and then again in *Gardner III*. Taxpayer/Gardner was a federal employee, employed by the IRS Chief Counsel's Office in Sacramento, California. His supervisors targeted Mr. Gardner for removal from his position of Senior Trial Attorney, based on allegations that he owed the IRS $1,680 based on a Houston, Texas IRS tax audit of his original 1990 tax federal tax return.

Mr. Gardner disagreed with the tax auditor's determination and appealed her decision to the IRS Appeal Office for review. However, consistent with IRS Assistant Sacramento District Counsel Neal O. Abreu's statement, that Mr. Gardner had "no administrative appeal rights" this taxpayer was not afforded his rights to exhaust his administrative remedies before the IRS Appeals Office, as afforded millions of other taxpayers who routinely appeal proposed IRS tax determinations to the IRS Appeals Office. The disparate treatment afforded this taxpayer occurred because of his IRS Sacramento District Counsel Attorney position. It also occurred because his supervisors did not want a fair and accurate review of the tax determination, because they wanted to use the $1,680.00 tax adjustment as a basis for terminating Mr. Gardner's employment. And in fact Mr. Gardner was terminated in November, 1994 for allegedly improperly filing his 1990 federal tax return based on the alleged 1990 tax deficiency.

Prior to Mr. Gardner's termination, he timely amended[10] his 1990 income tax return, by claiming deductions that were not included on his original 1990 return. The additional deductions would have resulted in an $1,939.00 overpayment of the original 1991 income tax assessment. This 1991 tax assessment was paid in full by federal income taxes withheld by Mr. Gardner's employer from his wages . Those federal withholding taxes were deemed advance payments made on April 15, 1991 which initially resulted in a $5,147.14 income tax refund to Mr. Gardner. [IRC § 6513(b)].**A32.** The IRS arbitrarily ignored the supplemental tax refund claim and declined to process the amended 1990 tax return or deny the refund claim.**A50.**

On March 18, 1996, the taxpayer timely filed tax refund actions with the U.S. District Court for the District of Columbia based on the IRS' failure to issue supplemental income tax refunds for several tax years including the 1990 tax year which was Count II of his complaint in *Gardner I.* **A47.**

The defendant moved pursuant to Rule 12(b)(1) to dismiss Count II because the taxpayer had not paid an August 22, 1995 supplemental tax assessment related to the same 1990 tax year.[11] The taxpayer never claimed a refund based

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[10] IRC§ 6511 provides tax returns can only be amended within 3 years of the date it is filed or 2 years from the date payment is made.

[11] In *Gomez v. Toledo*, 446 U.S. 635 (1980) this court held plaintiff need only allege the elements of his claims and is not required to anticipate defenses or counterclaims to the complaint.

on overpayment of the 1995 tax assessment. Nor did the defendant ever counterclaim the alleged $1,680 tax debt as an offset to the $1,939 refund claim. No federal rule of civil procedure exists that would defeat a tax refund suit based on "a" fully paid tax assessment. Based on this Court's decision in *Flora* and the 8th Circuit's decision in *Pfeiffer* the district court lacked subject matter jurisdiction to hear the defendant's 1995 deficiency claim of $1,680.[12] Only the U.S. Tax Court has jurisdiction to redetermine the tax for the entire 1990 tax year, the district court's jurisdiction is limited to the fully paid 1991 tax assessment for which the refund claim was made. *Id.*

In 1997, the IRS commenced levy action against Mr. Gardner based on the 1995 tax assessment, despite failing to comply with the mandatory tax deficiency notice requirements of 26 U.S.C.§6212 and §6213(a). On June 9, 1997, pursuant to IRC§ 6213(a) Mr. Gardner filed a motion to enjoin the IRS from all collection action until the required tax deficiency notice was mailed to "his last known address"[13]. The motion also stated since compliance with the tax deficiency notice requirements is a mandatory pre-requisite for the IRS to assess any tax, no legal tax debt arose because IRC §6213(a) prohibited the IRS *from making* the 1995 tax assessment.[14]

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[12] *Flora at 166; Pfeiffer 129 & n.10)*

[13] **No levy** or **proceeding in court** for the collection of tax shall be made, begun, or prosecuted until a tax deficiency notice has been mailed to the taxpayer.

[14] **No assessment** of a deficiency shall be made, begun, or prosecuted until a tax deficiency notice has been mailed to the taxpayer.

Accordingly, the district court had jurisdiction to determine the claimed over payment of the 1991 tax assessment.

The taxpayer subsequently withdrew his Temporary Retraining motion when the IRS released the levy. However, the district court declined to consider the taxpayer's Motion for Permanent Injunction. About a month later, the IRS mailed a second levy notice to Mr. Gardner, who on July 10, 1997 filed another motion for a Temporary Restraining Order.

On July 11, 1997, the district court held it lacked subject matter jurisdiction over the 1990 tax refund suit because "Mr. Gardner has not fully paid the 1990 tax assessment."**A33.** However, **no** claim for refund was ever made on a "1990 tax assessment" or existed in this case, only on a "1991 tax assessment which was fully paid and an alleged 1995 tax deficiency existed. **A32.** Furthermore, this Court held in *Shapiro*[15] and *Laing* [16] that a taxpayer is **not** required to pay a tax assessment when the notice deficiency procedures of IRC § 6212 and § 6213(a) have been violated.

The district court also denied Mr. Gardner's motions for injunctive relief based on lack of subject matter jurisdiction over violations of the mandatory statutory deficiency notice statutes. The taxpayer timely filed a Rule 59(e) motion for reconsideration which the district court later considered moot.**A21.**

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[15]*Shapiro, at 616.*

[16]*Laing at 184 n.27.*

On December 23, 1997, Mr. Gardner filed *Gardner III* which was a separate complaint asserting violations of his 5th Amendment rights to due process and violations of the mandatory Deficiency Notice Requirements of 26 U.S.C.§ 6212 and §6213(a).**A19-20.** The taxpayer also filed a separate motion for a Temporary Restraining Order and Preliminary Injunction on December 23, 1997 which was denied for failure to demonstrate the traditional equitable requirements of irreparable injury and lack of adequate remedy at law.**A20-21,A3.**

On February 18, 1998, the taxpayer amended his complaint to include the traditional equitable grounds for injunctive relief.**A.I.** The defendant filed a motion to dismiss Mr. Gardner's original complaint pursuant to Rule 12(b)(1) for failure to demonstrate a need for injunctive relief. The district court subsequently struck Mr. Gardner's amended complaint upon the basis that the plaintiff needed leave of court, despite the fact defendant never answered the complaint and Rule 15(a) allows an amendment without leave.**A3.**

On January 29, 1999, the district court dismissed Mr. Gardner's complaint for lack of subject matter jurisdiction. The court held the taxpayer "must meet the traditional equitable requirements of demonstrating irreparable injury and lack of adequate remedy at law, which he has not even plead."**A20-21.** The district court also dismissed Gardner's complaint for failure to prosecute under Rule 41(b) because of his medical absence from the first motion hearing. This dismissal permanently barred Mr. Gardner's recovery of his $1,939.00 tax overpayment because of the 3 year and 2 year tax refund claim limitations rules set forth in IRC§ 6511(a).

On May 19, 2000, the D.C. Circuit reversed the Rule 12(b)(1) and Rule 41(b) dismissals in *Gardner III*. However, the D.C. Circuit declined to reverse its *sua sponte* summary affirmance of the jurisdictional dismissal of the taxpayer's refund action based on the alleged 1995 tax debt. IRC§ 6213(a) clearly provides **no tax assessment** can occur prior to mailing a deficiency notice to the taxpayer's "last known address". The precise issues in *Gardner I* and *Gardner III* were the IRS' failure to comply with the mandatory tax deficiency notice requirements of IRC §6212 and §6213(a). Accordingly, the alleged 1995 tax assessment was void by statute and no tax debt existed which would divest the district court of subject matter jurisdiction to determine whether the 1991 tax assessment was overpaid and the taxpayer was entitled to a refund.

REASONS FOR GRANTING THE WRIT

I. D.C. CIRCUIT DECISION DIRECTLY CONFLICTS WITH LANDMARK DECISIONS OF THIS COURT.

Tax revenue is the life blood of the government and touches the lives of every citizen. National and fundamental tax issues that were resolved by this Court in *Flora*, *Shapiro*[17], and *Laing*[18] will be undermined by the D.C. Circuit's decision in this case if it is allowed to stand.

The D.C. Circuit's decision is in direct conflict with the landmark tax refund case of this Court in *Flora*, and the

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[17] *Shapiro, at 616.* [**certiorari granted from the District of Columbia Circuit.**]

[18] *Laing at 184 n.27.*

tax deficiency cases of *Shapiro* and *Laing* Each of these cases determines the jurisdiction of the U.S. District Courts in refund suits or the U.S. Tax Court in tax deficiency actions. Since Mr. Gardner filed a refund action in the district court it should be obvious that the full payment rule of *Flora* determines the district court's jurisdiction over this case.

The lower courts' failure to subordinate itself to this Court's clear and binding decisions without explanation or any attempts to distinguish these identical cases, are such a departure from the usual and accepted judicial practice that it warrants exercise of this Court's supervisory powers. The exercise of this Court's supervisor powers on the issues presented will undoubtedly assist other courts to correctly interpret the law.

A. District Court Has Jurisdiction Over The Fully Paid 1991 Tax Assessment Upon Which the Refund Is Claimed.

The district court's jurisdiction to hear and decide the taxpayer's 1990 tax refund action arises under the laws of the United States. This Court in *Flora* held 28 USC§1346(a)(1) confers subject matter jurisdiction on the district court only when "**the** tax assessment" upon which the refund is based was been fully paid prior to the commence of the action. **A6.** Here, the 1991 tax assessment was fully paid prior to filing the refund claim.**A32.** Thus, the district court is vested with jurisdiction over this tax refund action. *Flora.*

In *Gomez*[19] this Court stated plaintiff need only allege the elements of his claims and is **not** required to anticipate

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[19]*Gomez v. Toledo*, 446 U.S. 635 (1980).

defenses or counterclaims, i.e. a second tax assessment for the same tax year that was not paid. Thus the district court's jurisdiction is limited to the full payment of the specific 1991 tax assessment upon which the claim is based. *Flora*: §1346(a).

Once it is established that the 1991 tax assessment was paid in full then the court determines whether the taxpayer overpaid that 1991 tax assessment and therefore, is entitled to a tax refund**A32.**. Accordingly, the district court had jurisdiction over the tax refund action and no jurisdiction over the IRS' 1995 tax deficiency claim. *Flora, 175.*

B. District Court Lacks Subject Matter Jurisdiction Over 1995 Tax Deficiency

In tax deficiency cases this Court held in *Shapiro and Laing* that a valid notice of deficiency is a mandatory pre-requisite to assessment that deficiency. This Court also held in *Shapiro* and *Laing* that a taxpayer is **not** required to pay a tax assessment when the notice deficiency procedures of IRC § 6212 and §6213(a) have been violated. *Id.*616; *Id* 184 n. 27.

The burden is on the IRS to prove that it complied with the deficiency notice requirements **before** a tax debt is created requiring payment. The IRS provided no evidence that a valid notice of deficiency was mailed to the taxpayer's last known address or that the unpaid 1995 tax assessment was anything more than an offset to any tax refund due the taxpayer. An offset, is a defense to payment and has no legal effect on the district court's jurisdiction over the 1990 refund action. *Gomez.* Only the U.S. Tax Court has jurisdiction over

tax deficiency actions and have authority to redetermine the unassessed tax for the entire tax year.[20]

The lower courts need the guidance of this Court in reconciling the tax refund principles decided in *Flora* with the tax deficiency notice statute reviewed by this Court in *Shapiro* and *Laing*. The D.C. Circuit was unable or unwilling to distinguish the jurisdictional tax issues and statutes surrounding this tax refund action with a tax deficiency action.

C. D.C. Circuit Traditionally Had Difficulty Grasping Tax Deficiency Concepts.

The D.C. Circuit traditionally had difficulty grasping the tax deficiency concepts as evidence by this Court acceptance of certiorari from the D.C. Circuit in *Shapiro*. Now the D.C. Circuit has difficulty in applying the deficiency notice concept in *Laing and Shapiro* to the tax refund principles espoused by this Court in *Flora*. Accordingly, intervention by this Court would ensure that the lower courts recognize and preserve the separate jurisdictions of the Tax Court and District Courts as conferred by Congress. Intervention by this Court would provide clear guidance to the lower courts that a valid tax deficiency notice **must** be mailed to the taxpayer before a valid tax assessment requiring full payment under *Flora* must be made. Furthermore granting certiorari would protect the rights of all taxpayers by addressing the distinction between a tax refund proceeding and a tax deficiency proceeding in one precedential decision.

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[20]*Guthrie v. Sawyer*, 970 F.2d 733, 736-37 (10th Cir. 1992).

D. Rule 41(b) Dismissal For Medical Absence From Motion Hearing Was An Abuse of Discretion.

In *Link*[21] this Court preserved the issue of whether a single absence from a court proceeding could ever warrant dismissal for failure to prosecute under Rule 41(b). In this case, the D.C. Circuit held the district court abused its discretion. Therefore, *Gardner I* should be reversed for an abuse of the district court's discretion as was *Gardner II and III* by the D.C. Circuit. *Camp v. C&P Tel. Co.*, 692 F.2d 120, 125 (D.C.Cir. 1982).

II. IMPORTANT QUESTIONS OF FEDERAL LAW NOT DECIDED BY THE D.C. CIRCUIT

The fundamental issue of the subject matter jurisdiction of the U.S. Tax Court and the U.S. District Court and the scope of their authority to decide multiple tax issues for a given tax year, was not addressed by the D.C. Circuit.

The effect of the D.C. Circuit's decision on the jurisdiction of the district court would have a devastating adverse impact on the rights of all taxpayers and further blur the jurisdiction of the District Court and Tax Court in tax matters.

Jurisdiction in the U.S. Tax Court is based on mailing a valid deficiency notice to the taxpayer's last known address. This requirement would be eliminated by reliance on the D.C. Circuit decision. The IRS would no longer have to prove it complied with the mandatory notice deficiency requirements but could merely assert it was in compliance. That assertion

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[21] *Link v. Wabash RR, 375 U.S. 626, 633-634 (1962)*

could be raised at any time by the IRS to defeat a tax refund claim. It would also give the District Court subject matter jurisdiction over all tax issues for the entire tax year even though Congress exclusively granted the Tax Court such jurisdiction. *Flora 166; Pfeiffer at 129.*

The D.C. Circuit's decision in effect repeals the 2 year and 3 year refund claims rules of IRC§ 6511 and this Court's decision in *Lundy*.[22] Under IRC 6511, the taxpayer must file a tax refund claim with the IRS within 3 years (including extensions) from the date the tax return was filed or two years from the date a payment is made. In the instant case, the taxpayer filed his claim that he overpaid the 1991 tax assessment with the IRS based on the 3 years plus extension rule (4 years from the date the return was filed) and timely filed this action in the district court.[23] Thus, the district court has subject matter jurisdiction under *Flora. Id 175.*

If the taxpayer's 1990 tax refund action were dismissed for non-payment of the 1995 tax assessment, as the D.C. Circuit has held, the taxpayer would be permanently barred from ever obtaining a refund for overpayment of the 1991 tax assessment as this Court held in *Lundy. Id 857* Both the 2 year and 3 year claim rules would bar the taxpayer's refund claim on overpayment of the 1991 tax assessment. The taxpayer would be required to pay the 1995 tax

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[22] *Lundy v. IRS 45 F.3d 856, 858 (4th Circuit 1995), rev'd on other grounds, 116 S.Ct.647 (1996).*

[23] Theodore D. Peyser, *Tax Management Portfolio No. 631, Refund Litigation, p.A-1.; Smith v. Sperling, 354 U.S. 91, 93, n1 (1957).*

assessment and then file a new refund claim with the IRS for overpayment of that assessment. Under the 2 year rule, any refund would be limited to payment of the 1995 tax assessment. The 1991 tax assessment payment would not merge with payment of the 1995 tax assessment, therefore, a refund claim on overpayment of the 1991 tax assessment would be permanently barred because it would not be made within either 2 years of payment or 3 years from the date the return was filed. *Id.* "Nothing in the text of the statute [§6511] implies that a taxpayer who complied fully with the complex web of procedures must exhaust his administrative remedies twice merely because the government decided to assess an additional tax in response to the taxpayer's administrative claim."[24]

On the other hand, under *Pfeiffer* and *Flora* each payment of a tax assessment is a separate cause of action.[25] The district court has jurisdiction to decide whether the taxpayer is entitled to a refund for overpayment of the 1991 tax assessment. Furthermore, when the 1995 tax assessment is paid, the taxpayer could claim an overpayment from the IRS within 2 years from the date of that payment. IRC 6511. These separate causes of actions were recognized by the 8th Circuit in *Pfeiffer* and are consistent with IRC§6511 and *Flora*..

The D.C. Circuit's decision converts the mandatory deficiency notice statutes of IRC § 6212 and § 6213(a) to

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[24] *Keeter v. U.S. 957 F. Supp. 1160, 87,715 (Ed.Cal. 1997)*

[25] *Pfeiffer, 129; Flora 166.*

merely optional procedures. If we were to accept the D.C. Circuit's decision in *Gardner I & III*, we would sacrifice the harmony of our carefully structured twentieth century system of tax litigation. *Flora.* This Court should grant a writ of certiorari when its landmark precedential decisions are not followed or distinguished and could change the tax administrative system as we now know it.

III. DIRECT CONFLICTS BETWEEN D.C. CIRCUIT'S DECISION & OTHER CIRCUITS.

Direct conflict exists between the 5th[26], 8th, 9th[27] Circuits and the D.C. Circuit concerning the interpretation of the income tax refund tax laws and the scope of the district court's jurisdiction. Contrary to the D.C. Circuit's decision, the 8th Circuit in *Pfeiffer*[28] held,

> The Code stops short of compelling consolidation of all tax disputes for a given year in the district court. *Id. 129.*

Pfeiffer is consistent with this Court's decision in *Flora* and the statutory refund scheme established by Congress in IRC § 6511 and §6512. The D.C. Circuit decision, on the other hand, gives the district court jurisdiction over the entire tax year and requires each tax assessment to be fully paid before

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[26] *Gustin v. U.S., 876 F.2d 485 (5th 1989).*

[27] *Russell v. U.S., 592 F.2d 1069, 1072 (9th Cir.1979).*

[28] *Pfeiffer Company v. United States, 518 F.2d 124, 130 (8th Cir.1975).*

it has jurisdiction over any claim that **an** assessment was over paid.

The 5th the Circuit in *Gustin*, addressed the district court's jurisdiction over tax refund suits when the IRS alleges a tax deficiency. The 5th Circuit held even if the district court had no subject matter jurisdiction over the original refund complaint, it could and **must** resolve the issues raised by the complaint when those issues are presented by a counter claim, resting on an independent jurisdictional basis. It held the district court erred when it refused to review the refund claim.

Here, the D.C. Circuit refused to hear the refund claim based on the mere assertion of a counterclaim amount. Since no counterclaim was formally made the alleged tax deficiency had no effect on the court's jurisdiction over the refund action. *Flora* at 177.

The 9th Circuit's decisions in *Russell* also held, the Tax Court has jurisdiction over the entire tax year while the District Court has limited jurisdiction over the fully paid tax assessment. The Tax Court's jurisdiction trumps that of the District Court if a refund suit is commenced in the District Court and subsequently a petition is filed in the Tax Court for a redetermination of the tax for the same tax year.

Intervention by this Court will resolve splits among the Circuits on these issues and result in a uniform interpretation of the law.

IV. DENIAL OF CONSTITUTIONAL GUARANTEE CALLS FOR EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

"It is a necessary and well-settled rule that the exercise of jurisdiction by this Court to protect constitutional rights can not be declined when it is plain that the fair result of a decision is to deny rights.[29] The fundament rights of equal protection of the laws and due process of law are conferred, not by legislative grace, but by Constitutional guarantee.

In this, the taxpayer was an employee of the IRS and because of his employment he was not afforded the same protections under the law that were afforded other taxpayers. Neither the district court nor D.C. Circuit protected Mr. Gardner's rights to equal protection under the law or rights to due process of law.

A. Taxpayer Denied Equal Protection of The Laws.

26 U.S.C§ 6213(a) clearly ***prohibits*** the IRS from assessing any tax or levying to collect any tax until it has mailed a notice of the deficiency to the taxpayer. In a rush to terminate the employment of the sole remaining minority in the IRS Sacramento District Counsel's Office and to prevent Mr. Gardner from challenging the proposed IRS determination that was a basis for his termination, the IRS did not afford Mr. Gardner an administrative appeal nor mail him a notice of its intent to assess a tax deficiency. The tax deficiency notice would have allowed this taxpayer to file a

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[29] *Rogers v. Alabama,* 192 U.S. 230 (1904); *Smithsonian Institute v. St Johns*, 214 U.S. 19, 27 (1909).

petition in the U.S. Tax Court to redetermine the taxes for the entire 1990 tax year. Instead, no tax deficiency notice was mailed to the taxpayer, no opportunity to contest the proposed tax deficiency existed, and the IRS assessed and then levied Mr. Gardner's bank account. No notice, no opportunity to be heard occurred, simply because the taxpayer was an attorney for the IRS. Mr. Gardner should not lose his rights as a taxpayer merely because he was an IRS employee and the lower courts would not enforce his fundamental rights to notice and an opportunity to be heard.

B. <u>Taxpayer Denied Due Process of Law.</u>

There is no issue more important in this Nation, then to protect the Constitutional guarantees of due process afforded its citizens. This Court in *Dent*[30] stated the principles of due process come from the laws of England where it was designed to protect the subject against the arbitrary actions of the crown and place him under the protection of the law. The district court has traditionally accepted its role to protect individual rights, but not in this case. The appellate courts traditionally review district court decisions to ensure the Constitutional and statutory guarantees made to citizens are protect. However, here, the panel that reviewed and decided *Gardner III* refused to reverse the *sua sponte* dismissal of the panel that reviewed and decided *Gardner I* , and the full court declined to reconcile the intra Circuit conflict. Those issues were deferred to this Court for a decision and petitioner respectfully requests this Court review this case.

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[30] *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)

IRC§ 6212 was designed to ensure taxpayers like, Mr. Gardner received notice of the IRS' intent to assess a tax deficiency *prior to* the actual tax assessment. IRC §6213(a) was designed to protect Mr. Gardner from the surprise 1995 tax assessment and afford him the opportunity to be heard and offer evidence of the proposed tax assessment *prior to* the actual 1995 tax assessment. But the protections the law provides, were not afforded Mr. Gardner.

Nor was the 1995 IRS tax assessment determined void by the lower courts for violating the mandatory deficiency notice requirements of IRC §6212. Instead, the 1995 tax assessment was incorrectly used to divested the district court of its jurisdiction over the taxpayer's claim that he overpaid the 1991 tax assessment when the district court had jurisdiction of the tax refund suit.§1346(a)(1);. *Flora* at 177.

C. This Court Exercises Jurisdiction To Protect Constitutional Rights.

This Court held in *Chapman* and *Navigation* that a court must exercise its jurisdiction over rights arising under statutes of the U.S. enacted to protect constitutional rights. *Chapman v. Goodnow*, 123 U.S. 540, 548 (1887); *Navigation Co v. Homestead*, 123 U.S. 552 (1887). 26 U.S.C.§ 6212 and §6213(a) were enacted to protect Mr. Gardner's 5th Amendment right that the government can not deprive him of his property without due process of law. The IRS violated the fundamental 5th Amendment guarantee to protect Mr. Gardner from arbitrary government actions. This is the Court of last resort and is the only place were the Constitutional guarantee to protect Mr. Gardner's rights can be redeemed. Therefore, the fair administration of justice should compel this Court to exercise its supervisory powers to ensure that Mr.

to ensure that Mr. Gardner receive the full canopy of protection under the law afforded other citizens. *Id.* Full protection of the law for Mr. Gardner would disavow his supervisor's statement that he has no rights!

CONCLUSION

The ultimate sanction of an unwarranted dismissal has deprived taxpayer/Gardner of his fundamental rights. Mr. Gardner has been arbitrarily denied access to the district court even though Congress has conferred jurisdiction on the district court to hear his 1990 tax refund action. 28 U.S.C.§ 1346(a); *Flora.* Mr. Gardner seeks only to have his 1990 tax refund case adjudicated on the merits. Justice would require no less than for this Court to redeem the rights guaranteed Mr. Gardner by our Constitution and federal statutes. Those guarantees can only be redeemed by this Court granting certiorari.

Respectfully submitted this 4th day of December , 2000.

Bruce E. Gardner, Esq.

APPENDIX A

United States Court of Appeals
For The District of Columbia Circuit

Argued April 13, 2000 Decided May 19, 2000

No. 99-5065

Bruce E. Gardner
Appellant
v.
United States of America,
Appellee.

Appeal from the United States District
for the District of Columbia
(No.97cv03075)

Bruce E. Gardner, appearing pro se, argued the cause and filed the briefs for appellant.

Annette M. Wietecha, Attorney, United States Department of Justice, argued the cause for appellee. With her on the brief were *Gilbert S. Rothenberg*, Attorney, and *Mary Lou Leary*, United States Attorney at the time the brief was filed. Loretta C. Argrette, Assistant Attorney General, and *Edward T. Perelmuter*, Attorney, entered appearances.

Before: Edwards, *Chief Judge*, Henderson and Rogers, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* Edwards.

Edwards, *Chief Judge:* Bruce Gardner, appearing *pro se,* appeals the District Court's dismissal of his complaint for failure to prosecute and for lack of subject matter jurisdiction. Mr. Gardner alleges that the Internal Revenue Service ("the Service") unlawfully levied his property without first sending a notice of federal tax deficiency to his last known address. The District Court dismissed this complaint *sua sponte* for failure to prosecute under Fed. R. Civ. P. 41(b) ("Rule 41(b)") and, upon defendant's motion, for lack of subject matter jurisdiction. On appeal, the Service defends only the Rule 41(b) dismissal, abandoning any claim that federal courts lack subject matter jurisdiction over Mr. Gardner's cause of action.

The District Court understandably sought to sanction Mr. Gardner for failing to appear at a motions hearing. Given applicable Supreme Court and D.C. Circuit precedent, however, the District Court's dismissal in the context of the instant case constitutes an abuse of discretion. Mr.Gardner's nonappearance, while arguably irresponsible, did not justify a Rule 41(b) dismissal. In addition, the District Court erroneously found that it lacked subject matter jurisdiction over the complaint. Accordingly, we reverse and remand for further proceedings on the merits.

I. BACKGROUND

Mr. Gardner formerly worked as an attorney in the Office of Chief Counsel to the Service at the Treasury Department. He was terminated for his alleged failure to comply with federal and state tax laws. Mr. Gardner filed three complaints before the District Court, all related to his

compliance with federal and state tax laws; all were dismissed by the District Court. One of the complaints was a tax refund action, the dismissal of which this court summarily affirmed on October 8, 1999. The second complaint, appealed along with the instant case, seeks damages from a variety of defendants for allegedly unlawful disclosures of Mr. Gardner's's private tax information. The instant case involves Mr. Gardner's *pro se* complaint, filed December 23, 1997, claiming that the Service unlawfully levied Mr. Gardner' bank account for an alleged 1990 tax deficiency of almost $4,000 without sending him a notice of deficiency and an opportunity to challenge the assessment in the United States Tax Court. Mr. Gardner, seeking to enjoin the Service from levying his property, bases his complaint on 26 U.S.C.§ 6212(a) (Supp.IV 1998). Actions based on §6213(a) to enjoin the Service's assessment of a tax deficiency before the Service mails a notice of deficiency to the taxpayer are exempt from the Anti-Injunction Act of Internal Revenue code, 26 U.S.C.§ 7421(a) (Supp.IV 1998).

On February 18, 1998, the Service filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) ("Rule 12(b)(1)"), arguing that Mr. Gardner must meet traditional equitable requirements (*i.e*, demonstrate irreparable injury and the lack of an adequate remedy at law) as a prerequisite to obtaining injunctive relief under 6213(a). On the day the Service filed its motion, Mr. Gardner filed an amended complaint affirmatively pleading grounds for equitable relief. The District Court struck the amended complaint from the record, because Mr. Gardner had not sought leave to file.

After delays that no one attributes to Mr. Gardner, the

District Court scheduled a hearing on January 27, 1999, to consider the motion to dismiss, along with motions to dismiss filed in Mr. Gardner's other two cases. On January 21, Mr. Gardner moved to continue the motions hearing, contending that a continuance was necessary because he had the flu and he had suffered burns during a fire in his home. The District Court, after a tele-conference held on January 22, denied Mr. Gardner's motion. The District Court indicated that it would accommodate Mr. Gardner's physical condition during the hearing. Mr. Gardner failed to appear in court on January 27 and he telephoned the court later that evening to state that he had slept through the hearing.

On January 28, Mr. Gardner filed a motion to reschedule the hearing; the motion also offered an explanation for his absence from the January 27 hearing. He included a doctor's note stating that, on January 21, his physician treated him for syncope and bronchitis, prescribed antibiotics, and instructed Mr. Gardner to get bed rest. He also made several claims to the effect that his illness, the fire in his home, and his intense preparation for the motions hearing had combined to deprive him of necessary sleep and stamina. According to plaintiff, he was so disoriented that, until he heard the evening news on January 27, he was under the impression that it was January 26.

On January 29, the District Court denied Mr. Gardner's motion to reschedule the hearing. The court also granted defendant's motion to dismiss on two grounds. First, the District Court dismissed the complaint under Rule 41(b) for failure to prosecute the complaint. *See Gardner v. United States, Civ. Act.* No. 97-3075, Mem Op. & Order at 2 (D.D.C. Jan. 29, 1999). The court noted that it previously

had denied Mr. Gardner's motion for continuance and that Mr. Gardner had stated that he would appear on January 27. *See id.* At 1-2. The court also declared that it had not intended to hear arguments on January 27, because it already had decided to issue orally its ruling dismissing Mr. Gardner's complaint for lack of subject matter jurisdiction. *See id.* At 2. **The District Court found that it lacked jurisdiction because Mr. Gardner had failed to demonstrate irreparable injury and a lack of an adequate remedy at law**. *See id.* At 4 [emphasis added.]. The court dismissed as moot Mr. Gardner's motion for reconsideration of the order striking his first amended complaint from the record.

Mr. Gardner moved for reconsideration, further detailing the events leading up to his absence from the hearing. He stated that on January 12, 1999, he began taking Nyquil and Chlortrimeton, an antihistamine, and that he was without heat for one day in January because his house lost electricity during an ice storm, exacerbating his illness. Mr. Gardner also revealed that, on January 18, a fire had broken out in his children's room and he had sustained third-degree burns to his hands while dragging a burning mattress from the house. The court denied Mr. Gardner' motion for reconsideration. This appeal followed.

II. DISCUSSION.

A. Rule 41(b) Dismissal

Under Rule 41(b), a court may dismiss an action"[f]or failure of the plaintiff to prosecute or to comply with...any order of court". In the instant case, the District Court dismissed the complaint because Mr. Gardner failed to attend the January 27, 1999, motions hearing. We review for abuse

of discretion. *See Bristol Petroleum Corp. V. Harris*, 901 F.2d 165, 167 (D.C. Cir. 1990). While this is a deferential standard, we have made it clear that, " under certain circumstances, dismissal may be an unduly severe sanction for a single episode of misconduct." *Id.* A District Court may dismiss under Rule 41(b) "only after less dire alternatives have been explored without success." *Trakas v. Quality Brands, Inc.* 759 F.2d 185, 187 (D.C.Cir.1985).

The Supreme Court established the framework for reviewing a *sua sponte* dismissal for failure to prosecute in *Links v. Wabash Railroad Co*, 370 U.S. 626 (1962). In *Links*, plaintiff's counsel missed a pretrial conference but did not inform the court of his impending nonattendance until the day of the conference. *See id.* At 627-28. The District Court, after reviewing the history of the case (including plaintiff's repeated untimely responses to defendant's interrogatories), found that plaintiff's counsel did not provide a reasonable explanation for his nonappearance and dismissed the complaint for failure to prosecute. *See id.* At 628-29.

The Court affirmed the dismissal, failing to find an abuse of discretion because" (1) the District Court relied only in part on counsel's nonappearance; (2) the excuse offered by counsel was inadequate; and (3) "it could reasonably be inferred from his absence, as well as from the drawn-out history of the litigation, that petitioner had been deliberately proceeding in dilatory fashion." *Id.* At 633 (footnote and citation omitted). The Court did not reach "whether *unexplained* absence from a pretrial conference would *alone* justify a dismissal with prejudice if the record showed no other evidence of dilatoriness on the part of the plaintiff." *Id.* At 634 (first emphasis added).

As we previously have noted, it is important to recall that the "lawyer's default [in *Links*]... was merely the culmination of a protracted course of dilatory tactics and other improper behavior in litigation that had dragged on for six years." *Camp v. C&P Tel. Co*, 692 F.2d 120, 122 (D.C.Cir.1982) (footnote omitted). In contrast, this court has held "that dismissal is rarely if ever appropriate when there is but a single instance of attorney-misconduct," as in the instant case. *Id.* This is because the *sua sponte* dismissal of a lawsuit on the merits is "'a drastic step, normally to be taken only after unfruitful resort to lesser sanctions.'" *Id.* At 123 (quoting *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 123 (D.C.Cir. 1978)); *see also Bristol Petroleum Corp.*., 901 F.2d at 167 ("[D]ismissal is in order only when lesser sanctions would not serve the interests of justice.").

There are three basic justifications for dismissal because of attorney misconduct: (1) prejudice to the other party: (2) failure of alternative sanctions to mitigate the severe burden that the misconduct has placed on the judicial system; and (3) deterrence of future misconduct. *See Shea v. Donohoe Constr. Co.*, 795 F.2d 1071, 1074 (D.C.Cir. 1986). These justifications are not easily met. Prejudice, for instance, must be "so severe[] as to make it unfair to require the other party to proceed with the case." *Id.* Similarly, a malfeasant party places a severe burden on the judicial system if "the court [is required] to expend considerable judicial resources in the future in addition to those it has already wasted, thereby inconveniencing many other innocent litigants in the presentation of *their* cases." *Id.* At 1075-76. The final rationale, deterrence, justifies dismissals when there is some indication that the client or attorney consciously fails to comply with a court order cognizant of the drastic

ramifications. *See id.* At 1078.

Defendants have alleged no prejudice from Mr. Gardner's failure to appear at the January 27 conference. And given the District Court's observation that it would not hear argument at the hearing and its intention to resolve the case on jurisdictional grounds despite Mr. Gardner's failure to appear, his nonappearance cannot be said to have interfered with the orderly administration of th trial court's business. *Cf .id.* At *1076-77* (concluding that "repeated failure to attend status conferences" in that case did not constitute prejudice to the judicial system). Of the enumerated justifications for *sua sponte* dismissal, then, only the last, deterrence, has any application to the instant case.

Mr. Gardner's situation, however, is not one to which the deterrence rationale speaks with great eloquence. There are three reasons for this: first, this was Mr. Gardner's only failure to comply with an order of the District Court; second, there is no evidence that Mr. Gardner acted in bad faith by failing to appear at the hearing; and third, the trial court provided no warning to Mr. Gardner of the consequences of nonappearance. We also note that there is nothing in the record to indicate that the District Court considered alternative sanctions for Mr. Gardner's misbehavior.

The District Court did not identify any prior instance of misconduct on Mr. Gardner's part. Indeed, the court observed that Mr. Gardner's absence was "atypical." That Mr. Gardner had never before failed to comply with the District Court's orders argues in favor of reversal. *See Trakas,* 759 F.2d at 188. In fact, Mr. Gardner provided a supportable explanation for why he failed to attend the

hearing. Finally, the trial court did not warn Mr. Gardner that the case would be dismissed if he failed to appear. "Absent such advance warning [of the consequences], dismissal to drive lesson home , we think, is more akin to overkill than judicial discretion." *Camps*, 692 F.2d at 125. In short, dismissal in this case was unwarranted.

We appreciate the difficulty faced by the District Court in this case. Mr. Gardner had file three complaint before the court. One of the complaints consisted of 44 counts and named as defendants the United States, the Service, the State of California, and several individual Service employees, among others. Prior to dismissing the complaint in the instant case, the District Court had denied Mr. Gardner's motion for a continuance, and had been assured that Mr. Gardner would attend the January 27 hearing. In this circumstance, we cannot doubt that Mr. Gardner's failure to appear was an annoying occurrence. **Nonetheless, given that this was Mr. Gardner's only "failure... to prosecute or to comply with...any order of court," Fed.R.Civ.P. 41(b), we find that the District Court abused its discretion in dismissing his case.** [emphasis added]. Here we do not have a case of an unexplained absence from the motions hearing, or any evidence that Mr. Gardner deliberately sought to delay adjudication of the merits of his complaints. Moreover, the record does not show that the District Court considered the availability of a lesser sanction. While the District Court's decision in the instant case may not "'comprehend[] a pointless exaction of retribution.'" *Camps*, 692 F.2d at 123 (quoting *Jackson*, 569 F.2d at 123), it does cross the line to abuse of discretion. *See, e.g., Berry v. District of Columbia,* 833 F.2d 1031, 1037 (D.C.Cir.1987) (reversing dismissal where attorney failed to file a pretrial

brief by specified date, failed to attend a status conference, and failed to file a pleading specifically requested by the court); *Tolbert v. Leighton*, 623 F.2d 585, 587 (9th Cir. 1980) (finding abuse of discretion where the only evidence of dilatoriness was attorney's failure to attend a pretrial conference, the court had not warned that nonappearance would result in a dismissal, and the case was still "young").

We emphasize that we do not call into question the District Court's denial of both Mr. Gardner's motion for a continuance and his motion to reschedule the hearing, because those decision are not before us. **Nor does our disposition of this case review Mr. Gardner tax refund complaint, the dismissal of which this court summarily affirmed on October 8, 1999** [emphasis added.]. We hold only that, given the particular facts of this case, the District Court abused its discretion in dismissing Mr. Gardner's complaint for failure to prosecute.

B. ***Subject Matter Jurisdiction***

The District Court also dismissed Mr. Gardner's complaint under Rule 12(b)(1), holding that Mr. Gardner was required to plead equitable grounds for relief in order to obtain an injunction under 26 U.S.C.§ 6213(a). Before this court, the Government does not defend the District Court's Rule 12(b)(1) dismissal. Accordingly, there is no longer any dispute between the parties as to whether a federal court may entertain jurisdiction over Mr. Gardner's complaint. This does not moot the issue, however. We are a court of limited jurisdiction and must be satisfied through our own inquiry of our power to hear this dispute. *See Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 382 (1884). In contrast to the issue of personal jurisdiction, parties may not

waive or concede a federal court's subject matter jurisdiction. *See Jackson v. Ashton*, 33 U.S. (8 Peters) 148, 148-49 (1834) (reversing for lack of subject matter jurisdiction even though appellee had "no objection to the court's proceeding in the case.").

Mr. Gardner seeks an injunction preventing the Service from levying his bank account to assess an alleged deficiency in his 1990 federal tax return. The Anti-Injunction Act, a provision of the Internal Revenue Code, states, "[e]xcept as provided in section []... 6213(a), ... no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C §. 7421(a). The District Court must dismiss for lack of subject matter jurisdiction any suit that does not fall within one of the exceptions to the Anti-Injunction Act. Mr. Gardner seeks to bring his suit within one of §7421(a)' exceptions, arguing that the Service violated §6213(a) by levying his bank account without first mailing him a notice of deficiency. For the purposes of deciding whether we have jurisdiction over Mr. Gardner's complaint, we will accept as true his allegation that the notice of deficiency was never mailed to him.

Section 6213(a) established the Services' authority and responsibility to send a notice of deficiency to a taxpayer prior to initiating proceedings to assess the deficiency. With a notice of deficiency in hand, a taxpayer may file suit in Tax Court challenging the assessment, and the Service is prohibited from enforcing the assessment until the Tax Court's decision regarding the petition for review becomes final. *See id.* §6213(a). If the taxpayer does not file suit in

Tax Court in the time allotted after receipt of the notice of deficiency, the Service may, among other things, impose a levy upon the taxpayer's property, after notice, to recover unpaid taxes. *See id.* §6331(a)(1994).

There is some dispute among the circuits whether a taxpayer must allege traditional grounds for equitable relief to establish a *prima facie* claim under §6213(a) (*i.e.*, irreparable harm and lack of an adequate remedy at law.). The District Court, following the Ninth Circuit, dismissed the complaint, because Mr. Gardner failed to allege any equitable grounds for relief. *See* Mem. Op. & Order at 4 (*citing Elias v. Connett*, 908 F.2d 521, 523 (9th Cir. 1990)). The Ninth Circuit is in the lead among those circuits that imply this requirement in §6213(a) claims, with the circuit's's reasoning set out in *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 313 (9th Cir. 1982).

In *Cool Fuel*, the District Court had granted summary judgment for the Service where a taxpayer alleging a violation of §6213(a) had not met the requirements for equitable relief. The Ninth Circuit affirmed, finding both a presumption that equitable grounds be met for a court to issue an injunction and "that section 6213 does not abolish equitable tents to support injunctive relief." *Id.* (Relying on *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982)). The court emphasized §6213(a)'s permissive language. *See Cool Fuel*, 685 F.2d at 313 (noting that §6213(a) provides that an assessment based on a notice of deficiency "may be enjoined" by a court). Because a taxpayer retains the right to institute a refund suit after payment of taxes, and the taxpayer in *Cool Fuel* could afford to pay the disputed tax prior to an adjudication of the alleged deficiencies, the court found that

an equitable remedy was not available. The Third and Eleventh Circuits have followed the Ninth Circuit's rule. *See Flynn v. Eggers,* 786 F.2d 586, 591 (3rd Cir. 1986); *Lovell v. United States,* 795 F.2d 976, 977 (11th Cir. 1986).

The Tenth Circuit, *Guthrie v. Sawyer,*, 970 F.2d 733, 736-37 (10th Cir. 1992), reached a different result. Having reviewed the circuits' competing opinions, we think that the Tenth Circuit clearly has the best of the argument. Accordingly, we hold, in accord with *Guthrie,* that

> [t[he purpose of the statutory exception [in §6213(a)] is to preserve the taxpayer's right to litigate his tax liability in Tax Court *before* paying the tax. If the availability of a refund suit after payment prohibits the taxpayer from obtaining an injunction to protect his right to litigate first, that right is virtually meaningless. Under this approaches, this right would available only upon a showing that the taxpayer could not pay the tax. We have difficulty believing that Congress intended to give with one hand and take back with the other

970 F.2d at 736.

The result that we reach is not contrary to the principles announced in *Romero-Barcelo.* In that case, the Supreme court merely observed that courts should "not lightly assume that Congress has intended to depart from established [equitable] principles." 456 U.S. at 313. In *Romero-Barcelo,* however, the Court expressly distinguished *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978), in which the Court held that "Congress had foreclosed the

exercise of the usual discretion possessed by a court of equity" when it passed the Endangered Species Act, 16 U.S. C. §§1531-1544. *Romero-Barcelo*, 456 U.S. AT 313 (citing *Tennessee Valley Authority*, 437 U.S. at 173). According to the *Romero-Barcelo* Court, the difference was that in *Hill*, the statute providing the basis for the challenge "contain[ed] a flat ban] on the challenged activity. 456 U.S. at 314. Similarly, here §6213(a) flatly prohibits the activity challenged by Mr. Gardner. *See* 26 U.S. §6213(a) (providing that the Service shall begin "no levy or proceeding" to collect on a notice of deficiency until a period after the notice has been mailed to the taxpayer). This statutory scheme, in combination with the *Guthrie* Court's reasoning, convinces us that Congress did not intend that litigants need establish equitable grounds for injunctive relief under §6213(a).

We decline to follow *Cool Fuel* for a third reason. The *Cool Fuel* court cited *Bob Jones University v. Simon*, 416 U.S. 725, 742 n.16 (1974), to support its finding that "congressional history [of §6213(a)] is barren of indicated intent to abandon historical principles of equity jurisprudence." 685 F.2d at 313. *Bob Jones University* involved an interpretation of the Anti-Injunction Act, however, not §6213(a). In fact, the Court explicitly noted that "[n]one of the exceptions in §7421(a) is relevant to this case." *Bob Jones University*, 416 U.S. at 732 n.6. Therefore, it is of no moment that the Court in *Bob Jones University* held that traditional equitable principles were applicable to an action under the Anti-Injunction Act that did not fall into any of the enumerated exceptions. Of greater note, we think, is the Supreme Court's failure to discuss traditional grounds for equity jurisdiction when holding that taxpayers to whom the Service had not mailed notices of deficiency are entitled to

bring suit under §6213(a). *See Laing v. United States*, 423 U.S. 161, 183-85 & 184 n.27 (1976).

III. CONCLUSION

For the reasons articulated herein, we reverse the District Court's decision and remand for proceedings on the merits.

APPENDIX B

United States Court of Appeals
For The District of Columbia Circuit

No 99-5080 **September Term, 1998**

96cv00523

Bruce E. Gardner &
Benita D. Sparks-Gardner,
Appellants,

v.

United States of America,
Appellee.

United States Court of Appeals
For District of Columbia Circuit
Filed
Oct 8, 1999
CLERK

BEFORE: Silberman, Henderson, and Tatel, Circuit Judges

ORDER

Upon consideration of the motion for summary reversal, the response thereto, and the reply, it is

ORDERED that the motion for summary reversal be denied, and, on the court's own motion, the District Court's July 11, 1997, July 21, 1997, January 29, 1999, and March 3, 1999, orders dismissing appellant's complaint and denying reconsideration be summarily affirmed. Appellant's filing of a motion for summary reversal placed the merits of this appeal before court. The merits of the parties' positions are so clear

as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C.Cir.1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C.Cir. (Per curiam), cert. denied, 449 U.S. 994 (1980). **The District Court correctly determined that appellant could not seek a refund without first making full payment of his income tax liability for the year** [emphasis added] . See Flora v. United States, 357 U.S. 63 (1958), aff'd on reh'g, 362 U.S. 145 (1960).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See Fed.R.App.P.41(b); D.C.Cir.Rule 41.

Per Curiam
Initialed, Initialed, Initialed

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER, Plaintiff,	)	
	)	Civil Action No. 97-3075
v.	)	(EGS)
	)	
UNITED STATES, Defendants.	)	**FILED**
	)	**JAN 29 1999**
	)	Nancy Mayer-\Whittington. Clerk
	)	U.S. DISTRICT COURT

MEMORANDUM OPINION & ORDER
EMMET G. SULLIVAN, UNITED STATES DISTRICT JUDGE.

INTRODUCTION

On January 21, 1999, plaintiff filed a motion to continue the motions hearing that was scheduled for January 27, 1999. In his motion and during a telephone conference with opposing counsel on January 22, 1999, plaintiff communicated to the "Court that he was suffering from the flu and had slightly burned his hands while extinguishing a fire. The Court denied plaintiff's motion during the telephone conference, but only after considering that several of the defense counsel reside in the State of California and had incurred substantial costs in traveling to Washington, D. C for the hearing and after determining that plaintiff seemed healthy enough to appear in court.

During the telephone conference, the Court noted that plaintiff's injuries did not require him to seek the medical services of a doctor or travel to a hospital. Plaintiff did not sound congested or wheezy and, in the view of the Court, was not unclear in his thoughts. In an effort to accommodate plaintiff, the Court told plaintiff that he could remain seated during the arguments and that adequate water would be provided for him at counsel table. At that time, plaintiff indicated he would be present in court. Thereafter, the Court decided to issue an oral ruling on pending motions and dispense with argument.

When plaintiff failed to appear for argument on January 27, 1999, the Court stated that it would issue written rulings on all motions and that, in addition to other reasons for dismissal, plaintiff's complaint would be dismissed pursuant to Fed.R.Civ.P. P. 41(b) for failure to prosecute. Later that evening, plaintiff telephoned the Court and stated that he was on medication that caused him to oversleep and miss the motions hearing. Despite plaintiff's contact with the Court, the Court dismissed the case pursuant to Rule 41(b) as well as for the reasons set forth below.[1]

FACTUAL BACKGROUND

In conjunction with Civ. No. 96-523, plaintiff filed this complaint against the Untied States, alleging that administrative actions taken by the defendant deprived plaintiff of his property without due process of law.

1.Plaintiff's note-The court was presented with a doctor's note on January 28, 1999 with a motion to reset the hearing date for the next day. The court rejected the motion and doctor's note from the record by returning them to plaintiff.

Specifically, plaintiff claims that defendant failed to provide notice of an alleged 1990 tax deficiency, therefore not affording plaintiff an opportunity to challenge the alleged deficiency prior to the tax assessment. Defendant United States has filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1), arguing that plaintiff has not met his burden of demonstrating a need for injunctive relief.

DISCUSSION

I. Motion To Dismiss

The Anti-Injunction provision of the Internal Revnue Code, 26 U.S.C.§7421,[1] generally bars suits to enjoin the assessment or collection of taxes. Section 7421(a), however, is subject to several exceptions, one of which is that it does not forbid suits to enjoin the assessment of a deficiency, or a levy or proceeding in court for its collection, if the taxpayer has not been mailed a notice of deficiency and afforded an opportunity to secure a final Tax Court determination. See Laing v. United States, 423 U.S. 161, 185 n.27 (1976). "[O]nce a taxpayer satisfies one of the exceptions to the Act, he is no longer jurisdictionally barred from seeking an injunction...The taxpayer, however, must, in addition to satisfying an exception to the Act, also allege sufficient grounds to warrant equitable relief." Elias v. Connett, 908 F.2d 521, 523 (9th Cir. 1990) (citations omitted). The effect

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1. 26 U.S.C.§7421(a) states that "[e]xcept as provided in sections 6015(d), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6672(b), 6694(c), 7426(a) and (b)(1), 7429(B), AND 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against who such tax was assessed."

on the plaintiff is that although he may be able to prove that he did not receive notice from the United States, this exception merely allows him to seek an injunction. He still must meet the traditional equitable requirements of demonstrating irreparable injury and lack of adequate remedy at law, which he has not even plead. For these reasons, defendant's motion to dismiss is GRANTED.

II. Motion for Reconsideration

Plaintiff has filed a motion for reconsideration of the order striking plaintiff's first amended complaint from the record. Plaintiff merely argues that a motion to dismiss is not a responsible pleading and that he had an absolute right to amend compliant without leave of court. Given the recommendation of granting defendant's motion to dismiss, plaintiff's motion for reconsideration is DENIED AS MOOT.

III. Motion for a Status Hearing

Plaintiff has also filed a motion for a status hearing on the status of the February 1998 complaint for a permanent injunction against the IRS. Given the motions hearing held on January 27, 1999, this motion is DENIED AS MOOT.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss is granted, and the above-captioned case is DISMISSED WITH PREJUDICE.

1/29/99
Date

-S-
EMMET G. SULLIVAN
United States District Judge

APPENDIX D

EXCERPT FROM DECISION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER, et al Plaintiffs	)	
	)	Civil Action No. 96-523
v.	)	(EGS)
	)	
UNITED STATES, Defendants.	)	**FILED** **JAN 29 1999**
	)	Nancy Mayer-\Whittington. Clerk U.S. DISTRICT COURT

MEMORANDUM OPINION & ORDER

EMMET G. SULLIVAN, UNITED STATES DISTRICT JUDGE.

INTRODUCTION

On January 21, 1999, plaintiff filed a motion to continue the motions hearing that was scheduled for January 27, 1999. In his motion and during a telephone conference with opposing counsel on January 22, 1999, plaintiff communicated to the "Court that he was suffering from the flu and had slightly burned his hands while extinguishing a fire. The Court denied plaintiff's motion during the telephone

conference, but only after considering that several of the defense counsel reside in the State of California and had incurred substantial costs in traveling to Washington, D. C for the hearing and after determining that plaintiff seemed healthy enough to appear in court.

During the telephone conference, the Court noted that plaintiff's injuries did not require him to seek the medical services of a doctor or travel to a hospital. Plaintiff did not sound congested or wheezy and, in the view of the Court, was not unclear in his thoughts. In an effort to accommodate plaintiff, the Court told plaintiff that he could remain seated during the arguments and that adequate water would be provided for him at counsel table. At that time, plaintiff indicated he would be present in court. Thereafter, the Court decided to issue an oral ruling on pending motions and dispense with argument.

When plaintiff failed to appear for argument on January 27, 1999, the Court stated that it would issue written rulings on all motions and that, in addition to other reasons for dismissal, plaintiff's complaint would be dismissed pursuant to Fed.R.Civ.P. P. 41(b) for failure to prosecute. Later that evening, plaintiff telephoned the Court and stated that he was on medication that caused him to oversleep and miss the motions hearing. Despite plaintiff's contact with the Court, the Court dismissed the case pursuant to Rule 41(b) as well as for the reasons set forth below.[1]

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1 .**Plaintiff's note**- The court was presented with a doctor's note on January 28, 1999 with a motion to reset the hearing date for the next day. The court rejected the motion and doctor's note from the record by returning them to plaintiff.

FACTUAL BACKGROUND

On March 18, 1996 plaintiff and his wife filed this complaint, in which they sought to recover refund of federal income taxes allegedly owed to them for the year 1989, 1990, 1991, and 1993. In Count II plaintiffs claimed that they were entitled to a refund of their 1990 income tax, which, according to them, had been erroneously assessed and collected. On July 11, 1997, this Court granted defendant's motion to dismiss on the grounds that the plaintiffs had not paid the assessed tax in full, thereby failing to fulfill one of the requirements of subject matter jurisdiction.

On July 17, 1997, plaintiffs moved for reconsideration of the Court's Order dismissing Count II and filed a motion in which they sought to withdraw all remaining counts. On July 21, 1997, the Court granted the motion to withdraw the remaining counts, reformed the caption to include only plaintiff and not plaintiff's wife, and dismissed the case. Plaintiff has filed a motion for reconsideration pursuant to Fed.R.Civ.P. 60(b)(1), (4) & (6).[1] Defendant filed its response to plaintiff's motion for reconsideration of the dismissal of count II of July 25, 1997.

DISCUSSION

I. Legal Standard

"[T]he District court's grant or denial of relief under

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1. Rule 60(b) states in pertinent part that, "[o}n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable negligence;...(4) the judgment is void:...(6) any other reason justifying relief from the operation of the judgment."

Rule 60(b), unless rooted in an error of law, may be reversed only for abuse of discretion." Computer Professional v. U.S. Secret Service, 72 F.3d 897, 903 (D.C.Cir.1996).

II. Motion to Vacate Pursuant to Fed.R.Civ.P..P. 60(b)(1)

Plaintiff moves to vacate the Court's July 11 order pursuant to Fed.R.Civ.P. 60(b)(1), arguing that the court has jurisdiction over this tax-refund case pursuant to 28 U.S.C. §1346(a)[2] and Flora v. United States, 362 U.S. 145 (1960), and that the court was mistaken in holding that it did not. Plaintiff's argument ignores the majority opinion in Flora, which held that §1346(a)(1), correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained in a federal District Court. Id. At 177. Thus, although the federal District Courts have original jurisdiction over tax-refund cases, they lack subject matter jurisdiction until the challenged tax assessment was paid and that the court did not consider this documentation in its earlier ruling. Therefore, plaintiff's motion to vacate pursuant to Fed.R.Civ.P. 60(b)(1) is DENIED.

III. Motion to Vacate Pursuant to Fed.R.Civ.P. 60(b)(4)

Plaintiff also moves to vacate the Court's July 11 order pursuant to Fed.R.Civ.P. 60(b)(4), arguing that the court's failure to exercise jurisdiction renders the July 11 order void. Courts have held that "[a] judgment is void, and therefore subject to relief under Rule 60(b)(4), only if the

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2. 28 U.S.C. 1346(a)(1) provides that the District Courts shall have jurisdiction, concurrent with Court of claims, of "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws..."

court lacked jurisdiction or in circumstances in which the court's action amounts to a plain usurpation of power constituting a violation of due process." Houlst v. Houlst, 57 F.3d 1, 6 (1st Cir.1995); see also Combs v. Nick Garin Trucking, 825 F.2d 437, 442 (D.C.Cir.1987) ("Relief under Rule 60(b)(4) is not available merely because a disposition is erroneous. Rather, before a judgment may be deemed void within the meaning of the rule, 'it must be determined that the rendering court was powerless to enter it.'") citations omitted). In this case, the court ruled that it did not have jurisdiction, thus effectively preventing the issuance of a void order. Therefore, plaintiff's motion to vacate pursuant to Fed.R.Civ.P. 60(b)(4) is DENIED.

IV. Motion to Vacate Pursuant to Fed.R.Civ.P. 60(b)(6)

Finally, plaintiff moves to vacate the Court's July 11 order pursuant to Fed.R.Civ.P.. P. 60(b)(6), arguing that the interests of justice dictate that the Court provide equitable relief. The D.C. Circuit has stated that Rule 60(b)(6) may not be used as a substitute for an appeal. "Therefore, a party who has not pursued an appeal may obtain relief under rule 60(b)(6) only if there are 'circumstances... so extraordinary as to bring him within Klapprott[3] or Rule 60(b)(6).'" Twelve

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3. 335 U.S. 601 (1949). In Klapprott, the defendant's citizenship and certificate of naturalization was revoked pursuant to the entry of a default judgment. Four years later, the defendant sought to vacate the judgment on the ground that the judgment had been entered while he was wrongfully imprisoned by the government. The Supreme Court, reversing both the District court and the court of appeals, hailed that the defendant was entitled to a trial on the merits of the case. The Court paid particular attention to the "extraordinary" circumstances surrounding the case: The basis of the defendant's petition was not that he had neglected to act in his own defense, but that in jail as he was, weakened from illness, without a lawyer in the

John Does v. District of Columbia, 841 F.2d 1133, 1141 (D.C.Cir. 1988); see also Savage v. District of Columbia, No 94-7191, 1994 WL 704380, at * (D.C.Cir. Nov. 23, 1994) (Appellant " has not demonstrated that 'extraordinary circumstances' are present in this case to warrant Rule 60(b)(6) relief."). Plaintiff in the instant case has not demonstrated any extraordinary circumstances that would warrant relief under Fed.R.Civ.P. 60(b)(6) and could have filed an appeal of the Court's dismissal, which he has not. [2] Therefore, plaintiff's motion to vacate pursuant to Fed.R. Civ.P. 60(b)(6) should be DENIED.

CONCLUSION

For the foregoing reasons, plaintiff's motion to vacate is DENIED, and the above-captioned case is DISMISSED WITH PREJUDICE.

1/29/99

-S-
EMMET G. SULLIVAN
United States District Judge

---

denaturalization proceedings or funds to hire one, disturbed and fully occupied in efforts to protect himself against the gravest criminal charges, he was no more able to defend himself in the New Jersey court than he would have been had he never received notice of the charges.

2 . **Plaintiff's note-** Plaintiff initially filed a motion for reconsideration on July 17, 1997 pursuant to Rule 59(e) which the District court never addressed. Subsequently, plaintiff filed a Rule 60(b) motion to set a side the prior judgment. The District court has confused the unaddressed Rule 59(e) motion with the decided Rule 60(b) motion.. Furthermore, since the court never ruled on the rule 59(e) motion, the time period to appeal the court's decision to the D.C. Circuit had not yet expired.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER	)	
Plaintiff,	)	Civil Action No.
BENITA D. SPARKS-GARDNER	)	1:96CV00523 (EGS)
Plaintiffs	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	**FILED**
	)	**JUL 21 1997**
Defendant.	)	NANCY MAYER-WHITTINGTON,
		U.S. District Court

ORDER

This matter is before the Court upon Plaintiffs' Unopposed Motion to Withdraw Counts I, III, & IV from their complaint.

UPON CONSIDERATION of the entire record in this case, including Plaintiffs' Unopposed Motion to Withdraw Count I, III, and IV, any opposition, exhibits, or declarations filed and for good cause shown, it is by the Court this 18th, day of July, 1997, hereby:

ORDERED that Plaintiffs' Motion to Withdraw Counts I, III, & IV from their complaint is GRANTED.

IT IS FURTHER ORDERED that the caption shall be reformed to Bruce E. Gardner, Plaintiff v. United States, defendant. **[3]

DATE -S-
EMMET G. SULLIVAN
UNITED STATES DISTRICT JUDGE

Noticed:

Bruce E. Gardner
P.O. Box 6183
Washington, D.C. 20044

Richard Gilman, Esq.
U.S. Department of Justice
P.O. Box 227
Washington, D.C. 20044

**** There being no further issues before the Court, this case is DISMISSED. When the defendant has filed its response to plaintiff's motion for reconsideration of the dismissal of Count II, the Court will address that motion.**

-S-
EMMET G. SULLIVAN, U.S. District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER, and BENITA D. SPARK-GARDNER Plaintiffs,	)	
	)	Civil Action No.
v.	)	96-0523 (EGS)
UNITED STATES OF AMERICA; Defendant.	)	**FILED** **JUL 11 1997**
	)	Clerk U.S. DISTRICT COURT District of Columbia

ORDER

Pending before the Court is defendant's motion to dismiss Count II of plaintiffs' complaint on the grounds that the Court lacks subject matter jurisdiction. Also, pending before the Court are plaintiffs' motions for a permanent injunction and for a temporary restraining order relating to Count II which seeks an order enjoining the defendant from plaintiffs' bank account funds.

Plaintiffs filed this action on March 18, 1996, seeking recovery of taxes paid for 1989, 1990, 1991 and 1993. Count II involves Plaintiff Bruce Gardner's 1990 federal income tax

return and corresponding claim for refund.[1]

Mr. Gardner filed his 1990 federal income tax return on or about May 21, 1991. **That return reflected an overpayment and Mr. Gardner received a tax refund**.[emphasis added]. On or about April 15, 1995, Mr. Gardner amended his prior tax refund claim by notifying defendant of an additional tax refund owed to him in the amount of $1,939.00. On August 22, 1995, following an audit with respect to his 1990 federal income taxes, an assessment was made against Mr. Gardner which totaled $1,680.00. Mr. Gardner has not paid this tax assessment.

On or about June 9, 1997, plaintiffs moved for a Temporary Restraining Order concerning a levy issued against Mr. Gardner's bank account for the 1990 tax liability. The levy was released on June 9, 1997, and at a hearing on June 10, 1997, plaintiffs withdrew the motion for a Temporary Restraining Order. Plaintiffs subsequently filed a Motion for Permanent Injunction seeking an order permanently enjoining defendant from taking any action against Mr. Gardner with respect to the **1990 tax assessment**.[**Note Added**+ No 1990 tax assessment was in issue in this case.] On July 9, 1997, Mr. Gardner received notice of a second levy on his account. Plaintiffs filed a second motion for a Temporary Restraining Order on July 10, 1997.

1.Count I involves Plaintiff Gardner's 1989 federal income tax return and a claim for refund for that year. The government has also filed a motion to dismiss this Count. Count III and Count IV involve plaintiff Gardner's 1991 and federal income tax return and claim for refund, and plaintiffs' 1993 federal income tax return and claim for refund, respectively.

Count II of plaintiffs' complaint challenges the denial of Mr. Gardner's 1990 income tax refund claim of $1,939.00. However, Mr. Gardner has not fully paid the 1990 tax assessment(sic). Before an individual can seek a refund in this Court for overpayment of taxes, he must fully pay his outstanding liability. See Flora v. United States, 362 U.S. 145, 150-51 (1960) ("We conclude that the language of §1346(a)(1) can be more readily construed to require payment of the full tax before suit than to permit suit for recovery of a part payment."); United States v. Williams, ___ U.S. __, 115 S.Ct. 1611, 1619 (1995) ("Section 1346(a)(1) is a post deprivation remedy, available only if the taxpayer has paid the government in full." (Citing Flora, 362 U.S. at 150-51)); C.I.R. v Lundy, ___ U.S. __, 116 S.Ct. 647, 656 (1996) (noting that the Supreme Court in Flora held that "28 U.S.C §1346(a)(1) requires full payment of the tax assessment before taxpayer can file a refund suit in District Court"); District of Columbia v. Berenter, 466 F.2d 367, 375-76 (D.C.Cir. 1972) ("[T]he Supreme Court [in Flora] held that a taxpayer must pay the full amount of an assessed income tax deficiency before he may challenge its correctness in a refund suit."). [emphasis added] A failure to do so deprives the Court of subject matter jurisdiction. See Flora, 363 U.S. at 150-51.

Plaintiffs insist that because the 1990 tax assessment (sic) is invalid, Mr. Gardner has no 1990 income tax liabilities that should be paid before this Court has jurisdiction over this matter. However, plaintiffs' argument begs the question. Whether the assessment is invalid would be one of the issues to be decided by the Court. The law clearly provides that before the Court can determine the validity of the tax assessment, the tax liability pursuant to the tax

assessment must be fully paid. See Flora, 362 U.S. at 150-51; Williams, _ U.S. at __, 115 S.Ct. At 1619 (1995); Lundy, ___ U.S. at ____, 116 S.Ct. At 656; Berenter, 466 F.2d at 375-76. Accordingly, it is hereby

ORDERED that defendant's motion to dismiss Count II is **GRANTED**; it is further

ORDERED that plaintiffs' motions for injunctive relief are **DENIED.**

DATE: 7/10/97

-S-
EMMET G. SULLIVAN
U.S. DISTRICT JUDGE

APPENDIX G

BRUCE E. GARDNER
Attorney At Law
P.O. BOX 6183
Washington, D.C. 20044-6183
(202) 271-0552

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER, 1410 Kingsgate Street Mitchellville, Maryland 20721	} Civil Action No. 1:97CV03075 } (EGS)
Plaintiff,	} COMPLAINT FOR VIOLATION } OF NOTICE REQUIREMENTS OF } 5th Amendment USCA,
v.	} 26 U.S.C.§§6212, 6312(a)
THE UNITED STATES OF AMERICA	}
Defendant.	} Demand Jury Trial } VERIFIED COMPLAINT

FIRST AMENDED COMPLAINT[1]

1. Plaintiff, Bruce E. Gardner, is a citizen of the United States and was a resident of Washington, D.C. when the complaint was originally filed; defendant is the United States of America.

1. The bold face portion of this complaint reflects the amends made to the original.

2. This is a suit arising from arbitrary administrative actions taken by the **defendant's agent, the Internal Revenue Service (IRS),** to deprive plaintiff of his property in violation of his guaranteed U.S. Constitutional 5th Amendment to due process of law. The IRS failed to give plaintiff notice of an alleged 1990 income tax deficiency, therefore, not affording him an opportunity to challenge the **arbitrary taking of his property prior to the recordation of the invalid 1990 tax assessment and illegal tax levy and seizure**.

3. Subject matter jurisdiction is founded on 28 U.S.C.§ §1331, 1340, 1361, 1346(a), and 26 U.S.C.§§ 6212(a), 6213(a). Sections §6212(a) and 6213(a) of the Internal Revenue Code (IRC) override the anti-injunction statute of 26 U.S.C.§7421, therefore, allowing the defendant's actions to be enjoined. Laing v. United States, 423 U.S. 161, 184 n.27 (1976).

4. In pertinent part §6213(a) provides for an **injunction against IRS tax collection activities when defendant has not mailed an 26 U.S.C.§6212 notice of tax deficiency to plaintiff's "last known address", notwithstanding 26 U.S.C. §7421(a). D'Andrea v. Commissioner, 263 F.2d 904, 907 (D.C. 1959) [Last known address of taxpayer is address on power of attorney filed with IRS.]**

5. A substantial likelihood of success on the merits of this case exists because the:

(a) defendant can not legally assess taxes without first issuing a notice of deficiency to a taxpayer's "last known address" (IRC §6213(a), IRC §6502),

(b) defendant did not mail said notice to plaintiff's last known address as required by the 5th Amendment and IRC §6212, and

© the defendant's assessment of plaintiff's 1990 income tax was made on August 22, 1995, 129 days after the expiration of the statute of limitations for making the tax assessment. (IRC §6501(a), (e)(4)).

6. Irreparable harm flows from the defendant's arbitrary violations of plaintiff's 5th Amendment U.S. Constitutional rights. Jolly v. Couglin, 76 F.3d 468, 482 (2nd Cir. 1996) [constitutional violation per se result in irreparable injury]. The government's arbitrary action and total disregard of plaintiff's 5th Amendment rights to due process of law can not be adequately compensated monetarily. Schnell v. City of Chicago., 407 F.2d 1084, 1086 (7th Cir.1969).

7. A permanent injunction is appropriate here, because defendant violated

(a) plaintiff's U.S. Constitutional rights,

(b) federal laws regarding collection of federal income taxes and

© IRC §6213(a) provides for an injunction. Accordingly, the relief sought would not cause any substantial harm to defendant not contemplated by Congress.

8. The public has a compelling interest against arbitrary government actions and the public has a guaranteed right to be afforded due process of law prior to deprivation of property by the government. Fuentes v. Shevin, 407 U.S. 67 (1972). The U.S. Senate Finance

Committee Oversight Hearing on the IRS (9/97) heard the atrocities committed by the IRS against its citizens. The testimony at the hearings exposed the IRS' practice of arbitrarily violating the U.S. Constitution, federal laws, and its own policies. The public interest as exemplified by the creation of the U.S. Constitution prohibits arbitrary government acts by the IRS, in administering the tax laws.

9. Defendant in bad faith exercised its taxing power over plaintiff in order to assist plaintiff's former IRS employer in its wrongful termination against plaintiff. Some of the allegations in the adverse personnel action concern deductions taken by plaintiff on his 1990 federal income tax return. Plaintiff a former, GS 14-step 6, General Attorney (Tax) with the IRS' Chief Counsel's Office was wrongfully removed from his position based on the verified deductions claimed on his 1990 federal tax return.

10. This is an action to enjoin the defendant from continuing in force and effect both a purported *assessment* and *levies* against the property of plaintiff allegedly to be applied to federal income taxes due for the calendar year 1990 and for a mandatory injunction ordering the return to plaintiff of his property, including money, seized pursuant to such levies

No Notice of Tax Deficiency Mailed to Plaintiff's Last Known Address.

11. No valid income tax assessment or legal collection action can occur without first mailing a notice of the tax deficiency to a taxpayer's "last known

address".

12. On or about April 15, 1991 plaintiff mailed his 1990 U.S. Individual Income Tax Return (Form 1040) to defendant's Austin, Texas Service Center. The address reflected on the return was P.O. Box 262771, Houston, Texas 77207-2771 (Houston address).

13. Plaintiff's 1991 and 1992 Form 1040 were respectively mailed to defendant's Ogden, Utah Service Center on April 15, 1992 and April 15, 1993 and each notified defendant that his new address was P.O. Box 2165, North Highlands, CA 95660 (North Highlands address).

14. Plaintiff's 1990 Form 1040 was examined by the IRS's Houston, Texas IRS office.

15. By December of 1993 the IRS was concerned about the expiration of the April 15, 1994 statute of limitation period in which it had to assess plaintiff's 1990 income taxes. Defendant informed plaintiff of its intent to issue a notice of deficiency for the 1990 tax year.

16. On or about December 28, 1993, plaintiff agreed in writing (Form 872) with defendant to extend the 1990 tax assessment period from April 15, 1994 to April 15, 1995, and waive his statute of limitation defense, as long as, defendant did not mail a notice of deficiency for the 1990 tax year to him prior to April 15, 1995.

17. Form 872 contained both plaintiff's former Houston address and his current North Highlands address.

18. On November 28, 1994, plaintiff notified IRS by certified letter numbered P 002 126 260, to mail all future written correspondence regarding his 1990 Form 1040 to 3101 First Avenue, Sacramento, California (Sacramento address). **Pomeroy v. United States, 864 F.2d 1191, 1193-1194 (5th Cir.1989).** Exhibits 1 & 1a.

19. Defendant was also notified by the power of attorney form (Form 2848) enclosed with his letter to "Send all originals of notices and all other original written communications regarding this tax year [1990] to his representative at the stated address contained therein with a copy to the taxpayer." (Sacramento address) Exhibit 2. **D'Andrea v. Commissioner, 263 F.2d 904, 907 (D.C.Cir.1959) [IRS notified of new mailing address.]**

20. **On December 13, 1994, defendant received written notification of where plaintiff wanted all future written communications mailed in accordance with Crum v. Commissioner, 635 F.2d 895, 899-900 (D.C.Cir. 1980).** Exhibit 3.

21. Neither plaintiff's representative nor plaintiff received a notice of deficiency from defendant on or before April 15, 1995 or at any other time during the 1995 calendar year.

22. Defendant did not mail a notice of deficiency for the 1990 tax year to plaintiff's Sacramento address.

23. **Defendant is prohibited from collecting 1990 income taxes from plaintiff since it did not mail a notice of the 1990 tax deficiency to his Sacramento address.**

United States v. Zolla, 724 F.2d 808, 810 (9th Cir.), cert. denied, 469 U.S. 830 (1984). Abeles v. Commissioner, 91 T.C. 1014, 1026, 1028 (1988)

IRS Made Arbitrary 1990 Supplemental Tax Assessment

24. No 1990 supplemental income tax assessment can be made against plaintiff unless preceded by mailing a valid notice of deficiency to plaintiff's "last known address".

25. On August 22, 1995, IRS made a supplemental "quick assessment" in the amount of $1,680.00 against plaintiff for a purported 1990 income tax deficiency. Ex 4.

26. The 1990 supplemental income tax assessment was not preceded by mailing a notice of deficiency to plaintiff's "last known address".

27. The IRS' supplemental 1990 tax assessment was arbitrary and not supported by any provisions of federal tax laws.

IRS' Failure to Notify Plaintiff of the Supplemental 1990 Tax Deficiency Denied Plaintiff An Opportunity to Contest the Tax Deficiency Prior to Assessment & Violated Due Process Rights.

28. The issuance of a statutory 1990 notice of deficiency by the IRS is a jurisdictional prerequisite for admission to the United States Tax Court.

29. The IRS failed to send by registered or certified mail the 1990 statutory notice of deficiency to plaintiff, as

required by IRC §6212.

30. The IRS's failure to send a notice of the 1990 supplemental income tax deficiency to plaintiff deprived him of his right to challenge the proposed 1990 income tax deficiency in the United States Tax Court prior to its assessment.

31. Plaintiff was denied his 5th Amendment due process rights of notice and an opportunity to be heard prior to the seizure of his property by the government. **Laing, supra; Gilbert v. United States, 90-2 USTC 50,438; Jensen v. United States, 835 F.2d 196 (9th Cir.1988).**

32. Statutory injunctive relief pursuant to IRC 6213(a) and otherwise, is appropriate against the IRS' arbitrary tax levy and seizure of plaintiff's property because the IRS never mailed a notice of deficiency to plaintiff's "last known address".

1990 Supplemental Tax Assessment Barred By Statute of Limitations

33. The statute of limitations for all tax assessments regarding the 1990 tax year expired on April 15, 1995. IRC §6501 (c)(4).

34. On August 22, 1995, IRS made a "quick" supplemental 1990 income tax assessment against plaintiff for the 1990 tax year.

35. This quick tax assessment was made after the expiration of the mutual agreement between IRS and plaintiff to extend the statute of limitations to April 15,

1995.

36. The IRS' quick supplemental 1990 income tax assessment against plaintiff was made 129 days after the expiration of the statute of limitations.

37. The IRS' quick supplemental 1990 income tax assessment against plaintiff was barred by the statute of limitations. IRC§6501(a).

38. The IRS' quick supplemental 1990 income tax assessment against plaintiff was arbitrary and capricious and not supported by the law.

39. The quick IRS supplemental 1990 income tax assessment made against plaintiff was invalid. No legal collection activity can be based on a invalid supplemental 1990 income tax assessment. IRC §6502(a).

Levy & Seizure of Plaintiff's Property Was Arbitrary.

40. The perquisite for levy and seizure of property rests on a valid tax income assessment which is made within the statute of limitation period. IRC §6502.

41. Defendant is permanently barred from collecting taxes for the 1990 tax year from plaintiff based on the invalid 1990 supplemental income tax assessment and the statute of limitation bar.

42. Defendant by notice dated December 11, 1997 informed plaintiff that it would take money from his bank account in the amount of $3,931.60 based on the

August 22, 1995 supplemental income tax assessment for the 1990 tax year. Said notice of levy was received by plaintiff on December 16, 1997. Exhibit 5.

43. Citibank informed plaintiff in a letter dated December 17, 1997 that on January 5, 1998 it would turnover his property to defendant pursuant to the IRS levy. Exhibit 6.

44. After December 16, 1997, Plaintiff no longer had access to the $3,931.60 that was levied and later seized by the IRS on January 5, 1998.

45. Defendant's determination to levy and seize plaintiff's property as herein set forth, was arbitrary, capricious, an abuse of discretion, in excess of statutory authority, and contrary to plaintiff's statutory and constitutional rights.

46. Plaintiff has suffered irreparable injury as a result of defendant's unconstitutional acts, bad faith, omissions, and total disregard of the law.

WHEREFORE, plaintiff prays for:

1. permanent injunction enjoining defendant from collecting on or seeking to enforce by lien, levy, sale, or otherwise, the purported August 22, 1995 income tax assessment made against plaintiff for the 1990 tax year;

2. an order directing defendant and any agency or employee thereof to return all property heretofore seized pursuant to the August 22, 1995 tax assessment;

3. a release of all of the levies; and

4. Costs and such other relief as this Court deems appropriate.

I, declare that to the best of my knowledge and belief under penalties of perjury that all of the foregoing information contained in this complaint are true and correct.

Respectfully Submitted,

February 18, 1998

-s-

Bruce E. Gardner,Esq.
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Washington, D.C. 20044
(202) 271-0552

APPENDIX H

PAUL S. BESSON
ATTORNEY AT LAW
311 N STREET S.W.
Washington, D.C. 20024
(202) 863-0143

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE E. GARDNER, P.O. Box 6183 Washington, D.C. 20044. Plaintiff, v. BENITA D. SPARKS-GARDNER & BRUCE E. GARDNER 8522 Scotswood Way Antelope, CA 95843	}CASE NUMBER: } 1:96CV00523 . } }JUDGE: } Emmet G. Sullivan } }DECK TYPE }Civil General } }DATE STAMP } 03/18/96 }
UNITED STATES OF AMERICA Washington, D.C.	} COMPLAINT FOR } TAX REFUND } DEMAND OF } JURY TRIAL

COMPLAINT

1. Plaintiff, Bruce E. Gardner, an individual and citizen of the United States residing in the District of Columbia.

2. Plaintiff, Benita D. Sparks-Gardner, an individual and citizen of the United States residing in Sacramento,

California.

3. The Defendant is the United States of America.

4. This is a suit arising under the laws of the Internal code for the refund of income taxes and interest erroneously and illegally assessed against and collected from the Plaintiff(s).

5. Jurisdiction is conferred upon the Court by title 28, §§1340 and 1346(a)(1) of the United States Code, which provides that the District Court shall have original jurisdiction of any civil action arising under any act of Congress providing for internal revenue and for the recovery of any internal revenue tax alleged to have been collected without authority or any sum alleged to have excessive or in any manner wrongfully collected under the Internal Revenue laws, and on title 26, United States Code Antelope, CA 958437422 which provides for tax refund suits after a refund claim has been filed with Secretary of the Treasury.

COUNT ONE

(Calendar Year 1989)

6. On or before April 15, 1990, Plaintiff, Bruce E. Gardner timely filed a federal income tax return for the 1989 calendar with the Regional Service Center in Austin, Texas and paid the taxes reported due on said return.

7, Plaintiff filed a Form 1040X as a claim for refund, for additional amounts paid with respect to his 1989 income tax return. A copy of said claim is attached hereto as Ex A.

8. More than six months have elapsed since the filing of said Claim for Refund, and said Claim has not been allowed by the Internal revenue Service.

9. As grounds for recovery, Plaintiff herein incorporates by reference the averments contained in his claim for Refund for calendar year 1989, Exhibit a hereto.

10. Plaintiff has overpaid his federal income taxes for the calendar year 1989 and is entitled to recover from defendant the sum of $589.00 plus, interest, no part of which has been repaid to Plaintiff.

11. Plaintiff is the sole owner of his Claim against the Defendant and have made no assignment of said Claim.

COUNT TWO

(Calendar Year 1990)

12. On or before April 15, 1991, Plaintiff, Bruce E. Gardner timely filed a federal income tax return for the 1990 calendar year with the Regional Service Center in Austin, Texas and paid the taxes reported due on said return.

13. Plaintiff filed a timely claim for refund by submitting Form 1040X as a claim for refund on or about April 15, 1995, for additional amounts paid with respect to his 1990 income tax return. A copy of said claim is attached hereto as Exhibit B.

14. More than six months have elapsed since the filing of said Claim for Refund, and said Claim has been neither allowed or disallowed by the Internal Revenue Service.

15. As ground for recovery, Plaintiff herein incorporates by reference the averments contained in his claim for Refund for calendar year 1990, Exhibit B hereto.

16. Plaintiff has overpaid his federal income taxes for the calendar year 1990 and is entitled to recover from defendant the sum of $1,939.00 plus, interest, no part of which has been repaid to Plaintiff.

17. Plaintiff is the sole owner of his Claim against the Defendant have made no assignment of said claim.

COUNT THREE

(Calendar Year 1991)

18. On or before April 15, 1992, Plaintiff, Bruce E. Gardner timely filed a federal income tax return for the 1991 calendar with the Regional Service Center in Ogden, Utah and paid the taxes reported due on said return.

19. Plaintiff filed a timely claim for refund by submitting Form 1040X as a claim for refund on or about April 15, 1005, for additional amounts paid with respect to his 1991 income tax return. Ac copy of said claim is attached hereto as Exhibit C.

20. This claims for refund, Exhibit C hereto, was formally disallowed by the Internal Revenue Service of May 12, 1995. A true and correct copy of the Legal Notice of Disallowance of Claim is attached hereto as Exhibit d.

21. As grounds for recovery, Plaintiff herein incorporates by reference the averments contained in his claim for Refund for calendar year 1991, Exhibit C hereto.

33. Plaintiff has overpaid his federal income taxes of the calendar year 1991 and is entitle to recover from defendant the sum of $218.00 plus, interest, no part of which

has been repaid to Plaintiff.

23. Plaintiff is the sole owner of his Claim again the Defendant and have made no assignment of said Claim.

COUNT FOUR

(Calendar Year 1993)

24. On or before August 15, 1994, Plaintiffs, Benita D. Sparks-Gardner and Bruce E. Gardner timely filed, pursuant to a valid extension of time to file, a joint federal income tax return for the 1993 calendar year with the Regional Service Center in Ogden, Utah and paid the taxes reported due on said return.

25. Plaintiffs filed a timely claim for refund by submitting form 1040X as a claim for refund on or about April 18, 1995, for additional amounts paid with respect to their 1993 income tax return. A copy of said claim is attached hereto as Exhibit E.

26. More than six months have elapsed since the filing of said Claim for Refund, and said Claim has been neither allowed or disallowed by the Internal revenue Service.

27. As grounds for recovery, Plaintiffs herein incorporate by reference the averments contained in their claim for Refund for calendar year 1993, Exhibit E hereto.

28. Plaintiffs have overpaid their federal income taxes for the calendar year 1993 and are entitled to recover from defendant the sum of $3,794.00 plus, interest, no part of which has been repaid to Plaintiffs.

29. Plaintiffs are the sole owner of their Claim against the Defendant and have made no assignment of said Claims.

WHEREFORE, Plaintiff(s) prays for:

1. Judgment against the Defendant on Count One, Count Two, count Three, and Count Four in the total amount of $6,540.00 and interest as provided by law:

2. Plaintiffs' attorney's fees, costs, and costs in this action to paid by Defendant pursuant to title 28, United States Code 2414(b) and title 26, United States Code 7430; and

3. Such other relief as this Court deems appropriate.

Plaintiff demands trial by jury.

Dated: March 18, 1996

-s-

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APPENDIX I

United States Court of Appeals
For The District of Columbia Circuit

No. 99-5080 **September Term, 1999**
96cv00523

Bruce E. Gardner and,
Benita D. Sparks-Gardner
Appellants

v.

United States of America,,
Appellee

UNITED STATES COURT OF APPEALS
For District of Columbia Circuit
FILED
DEC 28 1999
CLERK

BEFORE: Silberman, Henderson, and Tatel, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed November 22, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: -s-
Robert A. Bonner
Deputy Clerk

APPENDIX J

United States Court of Appeals
For The District of Columbia Circuit

No 99-5065 **September Term, 1999**
96cv03075

Bruce E. Gardner,
Appellant,

v.

United States of America,
Appellee.

File On:
United States Court of Appeals
For District of Columbia Circuit
Filed
JUL 21 2000
CLERK

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed June 27, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: -s-
Robert A. Bonner
Deputy Clerk